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QUESTION PRESENTED

The Service Station Dealers of America will address the following question:

Whether the Court should overrule its holding in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that vertical maximum price fixing is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

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INTEREST OF AMICUS CURIAE[1]

The Service Station Dealers of America ("SSDA") is a national nonprofit trade association which represents the interests of service station dealers located throughout the United States. SSDA was formed in 1948, and represents twenty-six state and regional affiliates which in turn represent over 10,000 independent service station dealers in over thirty states. Those independent dealers have a vital interest in the issue presented to this Court, which challenges their right to determine their own retail prices. All parties have consented to the filing of this brief.

STATEMENT

Respondent Khan leased a service station and convenience store from petitioner State Oil Company ("State Oil"), pursuant to the terms of a lease and supply agreement which required him to purchase from State Oil the branded Union 76 gasoline which he resold to the public. The parties' lease and supply agreement further provided that respondent would purchase gasoline from petitioner at "suggested" retail prices set by petitioner, minus a margin of 3.25 cents per gallon. Pet. App. 2a-3a, 25a.

Under the terms of the lease and supply agreement, if respondent charged more than petitioner's "suggested" retail price, he was required to rebate to petitioner the entire amount by which his price exceeded the "suggested" retail price. This

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[1] In compliance with Rule 37.6 of this Court, amicus curiae, the Service Station Dealers of America, states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than this amicus curiae, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

eliminated any incentive for respondent to increase his prices, because he would inevitably sell fewer gallons of gasoline at a static margin. The lease and supply agreement further provided that petitioner would not reduce its price to respondent if respondent reduced his retail prices. Hence, respondent bore the full brunt of any reduction in retail prices.

By setting a uniform margin on all grades of gasoline, the lease and supply agreement eliminated any incentive for respondent to engage in price competition by decreasing his price for one grade of gasoline, while increasing his price for any other grade. Respondent could not, for example, offset a decrease in the price of regular gasoline by increasing the price which he charged for premium grades.

Reversing the district court's decision, the court of appeals held that the lease and supply agreement imposed maximum price fixing in a manner which was *per se* illegal under this Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Petitioner now requests this Court to overrule the holding in *Albrecht*.

SUMMARY OF ARGUMENT

Over the past eight decades, this Court has condemned as *per se* illegal *all* price-fixing agreements, whether maximum or minimum, whether horizontal or vertical. In so doing, this Court has repeatedly quoted the teaching of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 347 (1982); *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 647 (1980); *United States v. Parke Davis & Co.*, 362 U.S. 29, 47 (1960); *Kiefer-Stewart Co. v. Joseph E. Seagram*

& Sons, Inc., 340 U.S. 211, 213 (1951) (all quoting the holding in *Socony-Vacuum*). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988) ("vertical agreements on resale prices have been illegal *per se* since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)").

Albrecht v. Herald Co., 390 U.S. 145 (1968), typifies this line of authority which regards price as far too sensitive to allow manipulation through contract, combination or conspiracy. Writing for the Court, Justice White's key insight was that -

> substituting the perhaps erroneous judgment of a seller for the forces of the competitive market . . . may severely intrude upon the ability of buyers to compete and survive. . . . Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which customers desire and for which they are willing to pay.

Id. at 152-53. *See also Kiefer-Stewart*, 340 U.S. at 213 (the *per se* rule is applied to maximum price fixing agreements because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment").

Thirty years after *Albrecht* a more complete analysis can be provided to explain why maximum vertical price fixing threatens efficient capital allocation in the distribution of goods and services. At the heart of this analysis is a critical economic reality: *maximum resale price maintenance can occur only when a supplier has power over its dealers*. The dealers and franchisees most likely to be injured by this

behavior are, like consumers, the least powerful and most vulnerable players in the economic system. Protecting small business from oppressive wealth transfers remains a primary goal of antitrust law, particularly when that goal is consistent with efficient allocation of economic resources.[2]

Albrecht's holding is both sound and consistent with the unbroken line of authority condemning all forms of price fixing as illegal *per se*. That line of authority should neither be lightly eroded nor abandoned. "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Further, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Finally, *stare decisis* has "added force" where "citizens, the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations. . . ." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

All of these considerations apply here. Dealers in this industry, and franchisees in general, have sunk significant costs

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[2] Robert Lande, WEALTH TRANSFERS AS THE ORIGINAL AND PRIMARY CONCERN OF ANTITRUST: THE EFFICIENCY INTERPRETATION CHALLENGED, 34 Hastings L.J. 67 (1982). This Court, in making its assessment of the economic effects of non-price vertical restraints, has on two occasions since *Albrecht* acknowledged the importance of independent small entrepreneurs in downstream distribution. *Continental T.V. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 n.26 (1977); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 n.10 (1988).

into their businesses with the expectation that they would remain free to make their own pricing decisions, and not be subject to "the raising, depressing, fixing, pegging, or stabilizing" of prices by distant franchisors having imperfect knowledge of local marketing conditions. Congress has never suggested that their expectations should be dimmed, or that the *per se* rule against price-fixing should be trimmed or qualified. Petitioner and its supporting amici have failed to make any real world showing to justify curtailment of "the freedom of traders . . . to sell in accordance with their own judgment." *Kiefer-Stewart*, 340 U.S. at 213.

In their effort to overrule *Albrecht*, petitioner and its supporting amici imagine a parade of horrors which appears to consist of but one float bearing a single strawman representing a dealer with monopoly power. We submit that this phenomenon appears to the real world with the same approximate frequency as the Hale-Bopp comet. As this Court recognized in *Sharp Electronics*:

> Retail market power is rare, because of the usual presence of interbrand competition and other dealers, *see Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54, 97 S.Ct. 2549, 2559-60, 53 L.Ed. 2d 568 (1977), and it should therefore not be assumed, but rather must be proved.

487 U.S. at 727 n.2.

We submit that conjuring up a theoretical dealer-monopolist bogeyman does not justify the wholesale rejection of a well-established legislative interpretation which has stood, without congressional objection, for decades. This is particularly true where the proposed remedy would enable suppliers with market power to impose allocative inefficiencies on their dealers and the public, and would cripple the principle

of independent pricing which has been a hallmark of antitrust law for over 80 years. Further, the *per se* rule should not be abandoned here because the restraint at issue had the effect of fixing both maximum *and* minimum prices. Finally, if any modification to the *per se* rule is required, it should only be to permit the supplier an affirmative defense to demonstrate that it merely acted to counter the non-competitive prices of a truly monopolistic dealer.

LEGAL ARGUMENT

I. *ALBRECHT* IS CONSISTENT WITH ANTITRUST GOALS OF MAINTAINING EFFICIENT ALLOCATION AND AVOIDING OPPRESSIVE WEALTH TRANSFERS

Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc., 340 U.S. 211 (1951), involved two affiliated distillers who fixed the maximum price at which distributors could resell their brands of liquor. The Seventh Circuit found for the distillers, holding that an agreement "to fix maximum resale prices did not violate the Sherman Act because such prices promoted rather than restrained competition." *Id.* at 212. Reversing, this Court "reaffirm[ed] what we said" in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

Id. at 213 (*quoting Socony-Vacuum*, 310 U.S. at 223).

This Court did not deem itself to be creating new law in *Albrecht*, when it applied *Kiefer-Stewart* in a purely vertical

context. It viewed itself as simply applying "the long-accepted rule in § 1 cases that resale price-fixing is a *per se* violation of the law whether done by agreement or combination." *Id.* at 151 (*citing United States v. Potteries Co.*, 273 U.S. 392 (1927); *Socony-Vacuum; Kiefer-Stewart; United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956)). The Court concluded:

> We think *Kiefer-Stewart* was correctly decided, and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market.

Id. at 152. *See also Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 347 (1982) ("We have not wavered in our enforcement of the *per se* rule against price fixing.").

Maximum vertical price fixing as condemned by *Albrecht* inevitably involves a supplier's exercise of power over its downstream dealers. As Judge Posner recognized below, a supplier without this power "cannot squeeze his dealers' margins below a competitive level; the attempt to do so would just drive the dealers into the arms of a competing supplier." 93 F.3d at 1362. Judge Posner reasoned, however, that even a supplier lacking market power might impose a maximum resale price as long as the dealer margin was set at a "competitive level." *Id.* at 1363. But this strategy would entail substantial risk for the supplier because dealers operating in diverse labor, real estate, regulatory and taxation settings have varying costs. To obtain a competitive return, each dealer must set a resale price that reflects these local market conditions. Unless a maximum retail price were set high enough to satisfy all dealers (in which case the price would be meaningless unless it were intended as a minimum

price), a supplier without market power would lose dealers who find the margin too low. In short, a supplier can effectively impose a maximum price only if it has power over its dealers.

This power to impose maximum prices reflects an inelastic demand for the supplier's offerings. The supplier has the power to squeeze the dealers' margins by raising its own prices while restricting the dealers' resale prices. This is an exercise of market power over downstream dealers, defined as "the power to raise prices without losing so much business that the price increase is unprofitable." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 373 (7th Cir. 1986) (Posner, J.). *See also* William Landes and Richard Posner, MARKET POWER IN ANTITRUST CASES, 94 Harv.L.Rev. 937, 939 (1981).

That suppliers imposing maximum resale prices have power over downstream dealers may seem obvious, but theorists have been slow to focus on this point. Writing in defense of *Albrecht* in 1977, Professor Sullivan discussed the possibility of dealer exploitation, noting that if a dealer had made a specialized investment in plant or equipment, the dealer might be "locked into a situation where it cannot effectively resist such exploitation over the short or medium term." Lawrence Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 391 (1977). But the insight that supplier power over dealers was a prerequisite for maximum resale price maintenance came more recently. Warren Grimes, WHEN DO FRANCHISORS HAVE MARKET POWER? ANTITRUST REMEDIES FOR FRANCHISOR OPPORTUNISM, 65 Antitrust L.J. 105, 152 (1996).

The supplier's power may be traced to the dealer's sunk costs, which consist of both franchise fees and investments in fixed assets and inventory which cannot be retrieved if the

supplier terminates the dealer. In this case, for example, Khan was required to pay State Oil $100,000 in non-refundable origination and going concern fees to obtain his station (J.A. 16). Such fees visit significant non-recoverable costs on the franchisee, thereby distorting the balance of power between franchisor and franchisee. Faced with a margin-squeezing maximum resale price imposed by the supplier, the dealer will likely swallow the loss of revenue rather than lose its substantial sunk investment. This problem of supplier power based upon sunk costs is acute for many franchises. Sunk costs are commonplace and substantial in franchising. Grimes, *supra*, at 125; Gillian Hadfield, PROBLEMATIC RELATIONS: FRANCHISING AND THE LAW OF INCOMPLETE CONTRACTS, 42 Stan.L.Rev. 927, 951-52 (1990).[3]

Sunk costs have become an accepted tool of antitrust analysis. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 476 (1992), this Court discussed sunk costs (described as "switching costs") as a determinant of market definition in a tie-in case and concluded that the plaintiff's theory involving single-brand monopoly power should survive summary judgment. *See also Allen-Myland, Inc. v. IBM*, 33 F.3d 194, 205 (3d Cir. 1994). As a result of several iterations of federal merger guidelines, sunk costs are an accepted part of market analysis in merger cases. U.S. DEPT. OF JUSTICE AND

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[3] Franchising is pervasive in late twentieth century distribution. Service stations, fast food outlets, soft drink bottlers, beer distributors and many other retail businesses are operated as franchise outlets. According to one source, more than one-third of the dollars spent on retail transactions flow through franchised outlets. 1995 FRANCHISE ANNUAL H5 (Lewiston, N.Y., Info. Press). The ability of a franchisee to price flexibly for local market conditions (subject to the constraints of interbrand and intrabrand competition) is central to earning a fair return on a franchise investment.

FTC HORIZONTAL MERGER GUIDELINES, § 1.32 (1992) (defining sunk costs and explaining their relevance in identifying firms which belong in the relevant market).

One commentator has described the antitrust injury which franchisees suffer from maximum retail price fixing:

> A maximum price imposed by the franchisor on the franchisee can be an opportunistic action in much the same way as a requirements tie or an inventory disposition tie. The franchisor can set its own price to ensure a high margin but limit the margin of its franchisees through a vertically imposed maximum price. The result is allocation distortions, both in terms of the investment dollars of the franchisee that were inefficiently allocated to a franchise and the distorted incentives created for the continued flow of goods and services supplied by the franchisor. For example, the franchisor can insulate itself from market forces that would dictate the phasing-out of an inefficiently produced product. In response to the price ceiling, the franchisee may attempt to raise its price on other goods to offset its reduced revenue on the price-fixed item. Or, in order to maintain its margin on the price-fixed item, the franchisee may cut back on ancillary services that the consumer would prefer to receive.

Grimes, *supra*, at 153.

Congress has expressed its concern with the problem of supplier power as it pertains to the petroleum industry. Gasoline suppliers enjoy enormous leverage over dealers like Khan because they are the dealers' landlords, licensors and exclusive suppliers. As both the House and Senate Reports

accompanying the passage of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.*, explain:

> The franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in that the franchisor commonly not only grants a trademark license but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal sale item: motor fuel.
>
> Numerous allegations have been made before congressional committees investigating petroleum marketing problems that terminations and non-renewals, or threats of termination or non-renewal, have been used by franchisors to compel franchisees to comply with marketing policies of the franchisor.
>
> Essential to the problems faced by franchisees in this regard is the disparity of bargaining power which exists between the franchisor and the franchisee.

H.R. Rep. No. 1661, 95th Cong., 1st Sess., 14 (1977) and S.Rep. No. 731, 95th Cong., 2nd Sess., 17 (1978).

In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), this Court shared Congress' concern about this "disparity of bargaining power," and the resultant power of "franchisors to compel franchisees to comply with marketing strategies of the franchisor." Striking down a sham consignment device intended to fix the dealer's retail price, the Court said:

> Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from acts of God. . . .

> Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil. . . . The evil of this resale price maintenance program . . . is its inexorable potentiality for and even certainty in destroying competition in retail sales of gasoline by these nominal "consignees" who are in reality small struggling competitors seeking retail gas customers.

Id. at 20-21. *See also Atlantic Refining Co. v. FTC*, 381 U.S. 357, 368 (1965).

Here, as in most cases, maximum vertical price fixing is an allocation-distorting exercise of a supplier's power over a relatively powerless dealer. As such, it is properly condemned by an antitrust law designed to protect the consumers' interest in efficient allocation. As *Albrecht* concludes, the *per se* rule promotes full price and non-price competition at all distribution levels by prohibiting suppliers from substituting their "perhaps erroneous judgment . . . for the forces of the competitive market." 390 U.S. at 152. Khan suffered antitrust injury resulting from just such an erroneous judgment. Forced to follow State Oil's pricing dictates, his station was in receivership after a year.

II. THIS CASE EXEMPLIFIES HOW MAXIMUM PRICE FIXING ALSO ESTABLISHES MINIMUM PRICES

Albrecht identified a further evil of maximum price fixing which is present here. Such schemes "tends to acquire all the attributes of an arrangement fixing minimum prices." *Id.* at 153. *See also Maricopa County*, 457 U.S. at 348 (a maximum price fixing scheme "may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character").

A supplier lacking power over its dealers cannot impose resale maximum prices without risking the loss of high cost dealers. But by pushing the so-called "maximum" price to a level that satisfies all dealers, the supplier may impose a *de facto* minimum price under the guise of a "maximum price." Indeed, if this Court removes the *per se* rule for maximum price limits, a well-counseled defendant would be foolish not to invoke this classification defense.

As this Court recognized in *Albrecht* and *Maricopa County*, price fixing labeled as "maximum" may function as price fixing plain and simple, leaving the downstream dealer with no discretion to price either above or below the established price. In many cases, a fixed resale price may operate as a floor to some dealers and as a ceiling to others, presenting difficult classification problems for the court and involving protracted discovery and litigation over this issue.

State Oil's conduct in this case established both maximum and minimum prices. Petitioner's own brief explains how the dealer's minimum price was stabilized:

> The retailer was carrying three grades of gasoline. He claimed that if he had reduced the price of regular gasoline and increased the price of the two higher

> grades, he could both have sold more gasoline and earned more money. The increase in the price of the higher grades, plus the increased sale volume of the regular, would have more than covered the reduction in the price of the regular.

Id. at 7-8. In fact, the dealer could not reduce his price of regular gasoline because his margin was fixed on all grades of gasoline.

Discount dealers normally emphasize the pump price of their cheapest grade of gasoline, regular gasoline. State Oil, by directly fixing the maximum price for all of Khan's gasoline products, made it impossible for him to reduce the price of his most price sensitive grade. Competition suffered from State Oil's price interference because, as the receiver's subsequent experience demonstrates, the dealer's independent pricing strategy would have been well received in the marketplace. 93 F.3d at 1365. This is precisely the evil identified in *Albrecht* and *Maricopa County*.

III. NO JUSTIFICATION HAS BEEN PRESENTED FOR OVERRULING ESTABLISHED PRECEDENT WHICH HAS LONG BEEN RELIED UPON BY AMERICA'S RETAILERS AND ACCEPTED BY CONGRESS

This Court's interpretation of § 1 of the Sherman Act as condemning as illegal *per se* all contracts, combinations and conspiracies to fix prices is longstanding, and has never been challenged by Congress. "We have not wavered in our enforcement of the *per se* rule against price fixing." *Maricopa County*, 457 U.S. at 347. Given the importance of price competition in a free market system, this bright line rule appears to be fully justified. Indeed, petitioner and its

supporting amici have raised only the most theoretical objection to support a contrary result - the so-called dual monopoly paradigm.

"Virtually all criticism of the *Albrecht* rule is based upon the 'control of successive monopoly' economic paradigm." Mark Roszkowski, VERTICAL MAXIMUM PRICE FIXING: IN DEFENSE OF ALBRECHT, 23 Loy. U. Chi. L.J. 209, 228 (1992). But there is no reason to assume that the paradigm bears any significance in the real world. This Court has recognized that dealer market power is rare and should never be assumed:

> Retail market power is rare, because of the usual presence of interbrand competition and other dealers, *see Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54, 97 S.Ct. 2549, 2559-60, 53 L.Ed.2d 568 (1977), and it should therefore not be assumed, but rather must be proved.

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 727 n.2 (1988).

No dealer power or dual monopoly has been demonstrated in this case. Khan was hardly a monopolist; his business failed after a year. Nor did his ultimate supplier, Union Oil, possess monopoly power. In 1995, only 380 of the 4,038 branded stations in Illinois - less than 10% - flew the Union 76 flag. MARKET FACTS, 88 National Petroleum News 44-52 (1996).

Nor do other service station dealers - or franchisees in general - possess anything like the monopoly power feared by *Albrecht*'s critics. There are numerous significant competitors in the petroleum industry, each of which supplies thousands of retail outlets. They include such potent competitors as Amoco, BP, Chevron, Citgo, Exxon, Getty, Mobil, Phillips, Shell, Texaco and Union Oil. Understandably, Congress is not concerned with non-existent "dealer monopoly power" in the

petroleum industry, but rather with the obvious inequity of bargaining power between franchisees and franchisors. Nor has it been suggested that any other segment of the franchise industry is anything but fiercely competitive

Even if monopoly dealers truly existed, no reason has been shown to justify the overruling of long established precedent. Suppliers already possess more than adequate tools to deal with any aberrant dealer monopolist. First, the monopolist dealer can only exist through an exclusive agreement given by the supplier itself. The supplier gave the monopoly and it can take the monopoly away. Second, the supplier can control the monopolist dealer's prices through the imposition of volume requirements. Third, suppliers regularly compete with their dealers through company-operated facilities. There simply is no need to add price fixing to the supplier's arsenal.

Nor do the decisions primarily relied upon by petitioner and its supporting amici, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), detract from the long line of authority holding that all price-fixing agreements are illegal *per se*. In *GTE Sylvania*, this Court stressed that it was concerned "only with nonprice vertical restrictions." 433 U.S. at 51 n.18. The Court continued, "The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Id.*

One such significantly different question of analysis and policy involves the fostering of non-price competition. *GTE Sylvania* identified as a potential benefit of non-price vertical restraints the protection of exclusive dealers from "free riders," in order to permit them breathing space to provide additional services desired by consumers. *Id.* at 55. Conversely, *Albrecht* recognized that a detrimental effect of maximum vertical price-

fixing was that it discouraged dealers from engaging in just such non-price competition. 390 U.S. at 152-53. Another perceived benefit of vertical non-price restrictions is the use of exclusivity "to induce competent and aggressive retailers to make that kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." 433 U.S. at 55. Maximum price maintenance confers no analogous benefit.

USA Petroleum involved only the question of whether a *competitor* of the parties to a vertical maximum price-fixing agreement could assert antitrust injury. After examining the anticompetitive aspects of maximum price-fixing identified in *Albrecht*, the Court concluded that a competitor would not suffer antitrust injury because "such an agreement [is] *per se* unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*." 495 U.S. at 336 (emphasis in original). The Court then observed in *dictum* that "[t]he pro-competitive potential of a vertical maximum price restraint" had increased since *Albrecht* because exclusive territorial arrangements were no longer illegal *per se*, thus increasing the possibility of "monopolistic behavior by dealers" who possessed exclusive franchises. *Id.* at 343 n.13.

This concern is necessarily limited to the rare dealer capable of exhibiting "monopolistic behavior." Dealers lacking monopoly power necessarily would be driven to price at competitive levels. Even if this hypothetical monopolistic dealer posed an actual threat in the real world, there would be no need to overrule completely precedent which has shaped the face of American retailing for decades. All that would be required is to permit suppliers an affirmative defense to respond to excessive retail prices when a dealer monopoly truly exists. This Court's longstanding precedent should not be further eroded.

Allied-Signal, Inc. v. Directors Div. Of Taxation, 504 U.S. 768 (1992), considered the stringent test imposed on those who would overrule established precedent. In deciding whether to disturb existing law, "one relevant consideration is whether the decision is 'unsound in principle.'" *Id.* at 783 (*quoting Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546 (1985)). Another consideration is whether established precedent is "unworkable in practice." *Id.* Additional considerations are the "reliance interest" of affected parties, and recognition that "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Id.* (*quoting Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202 (1991)).

Because "the doctrine of *stare decisis* is of fundamental importance to the rule of law," this Court has held that "any departure" from the doctrine "demands special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (*quoting Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494 (1987), and *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984)). Moreover:

> [T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

Patterson, 491 U.S. at 172-73.

The petitioner and its supporting amici barely consider - much less satisfy - the considerable burden which they bear in

urging this Court to overrule longstanding precedent. They do not demonstrate that existing precedent is "unsound in principle," nor do they even suggest that it is "unworkable in practice." It is neither. The *per se* rule as presently interpreted by this Court promotes open price and non-price competition; preserves the competitive independence of individual traders; protects the public both from minimum price fixing agreements and from maximum price fixing agreements which tend to increase minimum prices; and protects all market participants from allocative injuries.

In addition, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Dealers and franchisees throughout this nation have expended uncounted sums in sunk costs in reliance upon the promise, expressly made in this Court's precedents, that they indeed would be independent entrepreneurs able to control their own prices. Now, after their investments of money and time have been made, petitioner and its supporting amici blithely suggest that they be summarily deprived of what this Court has described as "[p]ractically the only power they have to be wholly independent businessmen," the power to control the price of the articles which they sell. *Simpson,* 377 U.S. at 20-21.

Finally, petitioner and its supporting amici ignore the significant fact that this Court's longstanding interpretation of the Sherman Act has never been questioned by Congress. This Court said in another context:

> Congress has had almost 30 years in which it could have corrected our decision . . . and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere,

> and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us.

Hilton, 502 U.S. at 202. No basis has been shown to justify either overruling *Albrecht* or weakening the long established rule accepted by Congress that price fixing is illegal *per se*.

CONCLUSION

For the foregoing reasons, *Albrecht* should not be overruled.

Respectfully submitted,

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